

1 an administrative law judge (ALJ), which was held on February 13,
2 2008, before ALJ Richard Say. (Tr. 544-71.) Plaintiff, who was
3 represented by counsel, and vocational expert Deborah Lapoint (VE)
4 testified. The ALJ denied benefits on May 10, 2008, and the
5 Appeals Council denied review. (Tr. 15-24, 4-6) The instant matter
6 is before this court pursuant to 42 U.S.C. § 405(g).

7 **STATEMENT OF THE CASE**

8 The facts of the case are set forth in detail in the transcript
9 of proceedings, and are briefly summarized here. At the time of the
10 hearing, Plaintiff was 40 years old. (Tr. 548.) He had a high school
11 equivalency degree, was unmarried and lived with his fourteen year
12 old son in an apartment. (Tr. 549.) He testified he hurt his back
13 on the job in November 2000, and had earned very little money since
14 that time. He had past work experience as a construction worker
15 (form setter), a foundry worker, a janitor and a linen cleaner.
16 (Tr. 116, 565.) He had an extensive drug abuse history, but stopped
17 using so he could retain custody of his son. (Tr. 199.) He
18 testified he and his son do little cooking or cleaning. He stated
19 he was able to do laundry if necessary. (Tr. 551-52, 558-59.) His
20 daily activities included shopping, sitting and watching television,
21 sleeping and visiting with friends who come to see him. (Tr. 552,
22 559.) He testified he could lift ten or fifteen pounds, could sit
23 in a chair for about one half hour, stand five or ten minutes, and
24 walk about three blocks. (Tr. 553.) He stated he could squat or
25 bend over if he had to, but it caused him pain. He testified he was
26 not on any pain medication except occasional over-the counter
27 medicine. (Tr. 556.) At the time of the hearing, he had just
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1 started hepatitis C treatment. (Tr. 557-58.) He reported he had
2 over 30 criminal charges, most of them relating to assault or
3 domestic violence. (Tr. 563.)

4 **ADMINISTRATIVE DECISION**

5 ALJ Say first found Plaintiff met the insured status for DIB
6 purposes through December, 31, 2004. At step one, the ALJ found
7 Plaintiff had not engaged in substantial gainful activity since the
8 alleged onset date. (Tr. 17.) At step two, he found Plaintiff had
9 severe impairments of degenerative disk disease of the lumbar spine,
10 left eye blindness, an anxiety disorder, and a non-severe impairment
11 of hepatitis C. (Tr. 17-18.) He determined at step three that
12 Plaintiff's impairments, alone and in combination, did not meet or
13 medically equal one of the listed impairments in 20 C.F.R., Appendix
14 1, Subpart P, Regulations No. 4 (Listings). (Tr. 19.) At step
15 four, the ALJ found Plaintiff has the residual functional capacity
16 (RFC) to perform light work with the following non-exertional
17 restrictions: he should not do math; he has limited depth perception
18 and should avoid heights and moving machinery; he can climb or stoop
19 occasionally; he can carry out short, simple instructions; and he is
20 restricted to superficial contact with coworkers and the general
21 public. (Tr. 20.) In assessing Plaintiff's RFC, the ALJ found his
22 symptom statements were not credible to the extent they were
23 inconsistent with the RFC assessed. (Tr. 21.) Based on this RFC and
24 VE testimony, the ALJ found Plaintiff was unable to perform his past
25 relevant work. (Tr. 19.) Proceeding to step five, ALJ Say
26 determined Plaintiff was able to perform other jobs that existed in
27 significant numbers in the national economy, such as housekeeping
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1 cleaner, cafeteria attendant, and merchandise marker. (Tr. 23.) He
2 concluded Plaintiff was not under a "disability" as defined by the
3 Social Security Act at any time from the alleged onset date through
4 the date of his decision. (Tr. 24.)

5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
7 court set out the standard of review:

8 A district court's order upholding the Commissioner's
9 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
10 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
11 Commissioner may be reversed only if it is not supported
12 by substantial evidence or if it is based on legal error.
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
14 Substantial evidence is defined as being more than a mere
15 scintilla, but less than a preponderance. *Id.* at 1098.
16 Put another way, substantial evidence is such relevant
17 evidence as a reasonable mind might accept as adequate to
18 support a conclusion. *Richardson v. Perales*, 402 U.S.
19 389, 401 (1971). If the evidence is susceptible to more
20 than one rational interpretation, the court may not
21 substitute its judgment for that of the Commissioner.
22 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
23 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

24 The ALJ is responsible for determining credibility,
25 resolving conflicts in medical testimony, and resolving
26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
27 Cir. 1995). The ALJ's determinations of law are reviewed
28 *de novo*, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
25 "under a disability" are eligible to receive benefits. 42
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
27 medically determinable physical or mental impairment"
28 which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result

1 from "anatomical, physiological, or psychological
2 abnormalities which are demonstrable by medically
3 acceptable clinical and laboratory diagnostic techniques."
4 42 U.S.C. § 423(d)(3). The Act also provides that a
5 claimant will be eligible for benefits only if his
6 impairments "are of such severity that he is not only
7 unable to do his previous work but cannot, considering his
8 age, education and work experience, engage in any other
9 kind of substantial gainful work which exists in the
10 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
11 the definition of disability consists of both medical and
12 vocational components.

13 In evaluating whether a claimant suffers from a
14 disability, an ALJ must apply a five-step sequential
15 inquiry addressing both components of the definition,
16 until a question is answered affirmatively or negatively
17 in such a way that an ultimate determination can be made.
18 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
19 claimant bears the burden of proving that [s]he is
20 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
21 1999). This requires the presentation of "complete and
22 detailed objective medical reports of h[is] condition from
23 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
24 404.1512(a)-(b), 404.1513(d)).

25 It is the role of the trier of fact, not this court, to resolve
26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
27 supports more than one rational interpretation, the court may not
28 substitute its judgment for that of the Commissioner. *Tackett*, 180
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
Nevertheless, a decision supported by substantial evidence will
still be set aside if the proper legal standards were not applied in
weighing the evidence and making the decision. *Browner v. Secretary*
of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If
there is substantial evidence to support the administrative
findings, or if there is conflicting evidence that will support a
finding of either disability or non-disability, the finding of the
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987).

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred when he: (1) assessed Plaintiff's credibility; (2) found no severe mental impairments other than anxiety disorder; (3) improperly rejected treating and examining medical opinions concerning his psychiatric diagnoses; (4) improperly assessed his RFC; and (5) posed an incomplete hypothetical question to the VE. (Ct. Rec. 14 at 8, 10-14.)

DISCUSSION**A. Credibility**

Although Plaintiff asserts the ALJ erred in assessing his credibility, he does not identify specific findings that are erroneous. Nonetheless, *de novo* review indicates the ALJ's credibility findings are supported with "clear and convincing" reasons as required by case law. It is well-settled that when an adjudicator finds a claimant's statements as to the severity of impairments, pain and limitations are not credible, the ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude the ALJ did not arbitrarily discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). If there is no affirmative evidence that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's allegations regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The ALJ engages in a two-step analysis in

1 deciding whether to admit a claimant's subjective symptom testimony.
2 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007);
3 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the
4 first step, the ALJ must find the claimant has produced objective
5 medical evidence of an underlying "impairment," and that the
6 impairment, or combination of impairments, could reasonably be
7 expected to cause "some degree of the symptom." *Lingenfelter*, 504
8 F.3d at 1036. Once the first test is met, the ALJ must evaluate the
9 credibility of the claimant and make specific findings supported by
10 "clear and convincing" reasons. *Id.* In addition to ordinary
11 techniques of credibility evaluation, the ALJ may consider the
12 following factors when weighing the claimant's credibility: the
13 claimant's reputation for truthfulness; inconsistencies either in
14 his allegations of limitations or between his statements and
15 conduct; daily activities and work record; and testimony from
16 physicians and third parties concerning the nature, severity, and
17 effect of the alleged symptoms. *Light v. Social Sec. Admin.*, 119
18 F.3d 789, 792 (9th Cir. 1997); *Fair v. Bowen*, 885 F.2d at 597 n.5
19 (9th Cir. 1989).

20 The ALJ may also consider an unexplained failure to follow
21 treatment recommendations and testimony by the claimant "that
22 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,
23 1039 (9th Cir. 2008). As explained by the Commissioner in his policy
24 ruling, the ALJ need not totally reject a claimant's statements; he
25 may find the claimant's statements about pain to be credible to a
26 certain degree, but discount statements based on his interpretation
27 of evidence in the record as a whole. SSR 96-7p. "For example, an
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1 adjudicator may find credible an individual's statement as to the
2 extent of the functional limitations or restrictions due to
3 symptoms; *i.e.*, that the individual's abilities to lift and carry
4 are compromised, but not to the degree alleged." *Id.* If the ALJ's
5 credibility finding is supported by substantial evidence in the
6 record, "the court may not engage in second-guessing." *Thomas*, 278
7 F.3d at 959; *Fair*, 885 F.2d at 604 ("credibility determinations are
8 the province of the ALJ").

9 Here, as noted by the ALJ, there is affirmative evidence of
10 malingering. Specifically, the ALJ found evidence of malingering,
11 criminal behavior, and drug and alcohol abuse. (Tr. 18, 199.) He
12 noted Plaintiff's medical providers reported Plaintiff was
13 exaggerating his symptoms, was inconsistent in his report of
14 criminal history, his child protective services history and
15 substance abuse. (*Id.*; Tr. 198, 206.) In addition, ALJ Say
16 referenced results of objective testing by Dr. Debra Brown that
17 indicated Plaintiff was malingering, and in her opinion, although
18 he would have difficulty working with others due to anti-social
19 traits, Plaintiff could work. (Tr. 18, 206-07, 215.) In explaining
20 his basis for the RFC determination (which limited Plaintiff to
21 "superficial contact" with coworkers and the public), the ALJ
22 summarized Plaintiff's testimony, specifically noting
23 inconsistencies between his allegations and the objective medical
24 evidence, his statement to medical providers and the opinions of
25 treating sources who opined he could perform work. (Tr. 21-22, 206,
26 215, 222.) To reject a claimant's subjective complaints, the ALJ
27 must provide "specific, cogent reasons for the disbelief." *Morgan*,
28 169 F.3d at 599 (quoting *Rashad v. Sullivan*, 903 F.2d 1229, 1231

(9th Cir. 1990). If there is no affirmative evidence of malingering, the reasons must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995.) Because there is clear evidence of malingering, "clear and convincing" reasoning was not required to reject Plaintiff's subjective statements. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Nonetheless, the ALJ rationally interpreted the evidence and articulated "clear and convincing" reasons for discounting the severity of Plaintiff's assertions of disabling symptoms. (Tr. 21.) Further, it is also noted that the ALJ's credibility findings did not totally reject Plaintiff's subjective symptoms. The final RFC incorporates exertional and non exertional limitations supported by the record in its entirety and Plaintiff's credible statements. (Tr. 20-22.)

B. Step Two: Mental Impairments

Plaintiff argues the ALJ erred when he ignored the diagnoses of medical sources and failed to find severe mental impairments of psychotic disorder and anti-social disorder. However, Plaintiff does not specify which medical source opinion he believes was erroneously ignored. (Ct. Rec. 14 at 13.) Further, *de novo* review indicates the ALJ properly evaluated the medical evidence and supported his determination by proper reference to the record.

At step two of the sequential evaluation, the ALJ determines whether a claimant suffers from a "severe" impairment, *i.e.*, one that significantly limits his physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). To satisfy step two's requirement of a severe impairment, the claimant must prove the existence of a physical or mental impairment by providing

1 medical evidence consisting of signs, symptoms, and laboratory
2 findings; the claimant's own statement of symptoms alone will not
3 suffice. 20 C.F.R. §§ 404.1508, 416.908. The fact that a medically
4 determinable condition exists does not automatically mean the
5 symptoms are "severe," or "disabling" as defined by the Social
6 Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair*,
7 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir.
8 1985).

9 The Commissioner has passed regulations which guide dismissal
10 of claims at step two. Those regulations state an impairment may be
11 found to be not severe when "medical evidence establishes only a
12 slight abnormality or a combination of slight abnormalities which
13 would have no more than a minimal effect on an individual's ability
14 to work." SSR 85-28.¹ "The severity requirement cannot be satisfied
15 when medical evidence shows that the person has the ability to
16 perform basic work activities, as required in most jobs." Basic
17 work activities include: "walking, standing, sitting, lifting,
18 pushing, pulling, reaching, carrying, or handling; seeing, hearing,
19 speaking; understanding, carrying out and remembering simple
20 instructions; responding appropriately to supervision, coworkers,
21 and usual work situation." *Id.*

22 As further explained in the Commissioner's policy ruling,
23 "medical evidence alone is evaluated in order to assess the effects
24 of the impairments on ability to do basic work activities." *Id.*

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26 ¹ The Supreme Court upheld the validity of the Commissioner's
27 severity regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*,
28 482 U.S. 137, 153-154 (1987).

1 Thus, in determining whether a claimant has a severe impairment, the
2 ALJ evaluates the medical evidence submitted and must explain the
3 weight given to the opinions of accepted medical sources in the
4 record. The agency regulations distinguish among the opinions of
5 three types of accepted medical sources: (1) sources who have
6 treated the claimant; (2) sources who have examined the claimant;
7 and (3) sources who have neither examined nor treated the claimant,
8 but express their opinion based upon a review of the claimant's
9 medical records. 20 C.F.R. §§ 404.1527, 416.927. A treating
10 physician's opinion carries more weight than an examining
11 physician's, and an examining physician's opinion carries more
12 weight than a non-examining reviewing or consulting physician's
13 opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004);
14 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), "As is the case
15 with the opinion of a treating physician, the Commissioner must
16 provide 'clear and convincing' reasons for rejecting the
17 uncontradicted opinion of an examining physician." *Lester*, 81 F.3d
18 at 830 (citation omitted). If the opinion is contradicted, it can
19 only be rejected for "specific" and "legitimate" reasons that are
20 supported by substantial evidence in the record. *Andrews*, 53 F.3d
21 at 1043.

22 Historically, the courts have recognized conflicting medical
23 evidence, the absence of regular medical treatment during the
24 alleged period of disability, and the lack of medical support for
25 doctors' reports based substantially on a claimant's subjective
26 complaints of pain as specific, legitimate reasons for disregarding
27 a treating or examining physician's opinion. *Flaten v. Secretary of*
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1 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*,
2 885 F.2d at 604.

3 1. Psychotic Disorder

4 The ALJ discussed the Plaintiff's psychiatric evaluation for
5 child protective services completed by David Bot, M.D., dated
6 December 22, 2005, in which Dr. Bot diagnosed psychosis, NOS;
7 personality disorder NOS with antisocial features. (Tr. 19, 22,
8 222-26.) He specifically found that Dr. Bot noted "the claimant did
9 not currently present as psychotic and opined that his psychotic
10 symptoms might be exclusively related to his drug use." (*Id.*) As
11 indicated in Dr. Bot's report, Plaintiff reported methamphetamine
12 use two months before his interview with Dr. Bot. Plaintiff stated
13 "using methamphetamine was his business," but he did not use around
14 his son. (Tr. 225.) He also reported he could not remember the
15 last time he had heard voices (which he did not consider a "big
16 deal"); he stated he was planning to work in the spring, and was
17 working the week before the evaluation. (Tr. 222.) The ALJ was
18 not required to reject Dr. Bot's opinion that Plaintiff was not
19 psychotic at the time of the interview, or Dr. Bot's speculation
20 that symptoms were related to drug abuse, as these opinions were
21 reasonably interpreted as consistent with the ALJ's exclusion of
22 psychotic disorder as a severe mental impairment. 20 C.F.R. §§
23 404.1520(c), 416.920(c).

24 2. Anti-social Personality Disorder

25 It is noted on *de novo* review that agency psychologist Jerry
26 Gardner, Ph.D., opined Plaintiff exhibited symptoms of a personality
27 disorder and was markedly limited in his ability to interact
28 properly with the general public. (Tr. 176, 179-80.) However, Dr.

1 Gardner opined in his narrative portion that Plaintiff could be
2 pleasant and appropriate, and provided care for his son. He
3 concluded Plaintiff was able to "carry out superficial task related
4 social interactions appropriately," but "may have more than average
5 conflict with supervisors and coworkers." (Tr. 179-80.) The ALJ
6 acknowledged Dr. Gardner's non-examining medical source opinion, and
7 included corresponding restrictions in his RFC. (Tr. 22.) The ALJ's
8 decision reflects reasoned consideration of reports and evaluations
9 from other mental health sources, including the reports from Dr.
10 Brown, Dr. Bot, and reviewing psychologist James Bailey's opinions
11 that Plaintiff could follow multi-step tasks and work in a limited
12 public contact setting. (Tr. 18-20, 329-30, 341, 361.) The ALJ
13 thoroughly summarized and rationally interpreted the medical
14 evidence and properly considered Plaintiff's significant lack of
15 credibility in his step two analysis. 20 C.F.R. §§ 404.1520,
16 416.920; 404.1520a, 416.920a, 404.1520a(d)(1), 416.920a(d)(1); *Webb*
17 *v. Barnhart*, 433 F.3d 683, 685 (9th Cir. 2005) (credibility an
18 appropriate factor to consider in evaluation of medical evidence
19 when claimant's subjective complaints conflict with medical
20 evidence). Finally, even assuming the diagnosed personality
21 disorder were severe, Plaintiff was not prejudiced by this omission
22 because the identified limitation caused by anti-social personality
23 disorder was considered throughout the sequential evaluation and
24 included in the hypothetical at step five. (Tr. 565-66.) Therefore,
25 the claimed error would be harmless. *Lewis v. Astrue*, 498 F.3d 909,
26 910 (9th Cir. 2007); *Stout v. Commissioner, Social Sec. Admin.*, 454
27 F.3d 1050, 1056 (9th Cir. 2006)

1 **C. RFC Determination**

2 It is well-settled that the ALJ is "responsible for determining
3 credibility, resolving conflicts in medical testimony and for
4 resolving ambiguities," in these proceedings. *Richardson*, 402 U.S.
5 at 400; *Andrews*, 53 F.3d at 1039; SSR 96-8p. The final
6 determination regarding a claimant's ability to perform basic work
7 is the sole responsibility of the Commissioner. 20 C.F.R. §§
8 404.1546, 416.946; SSR 96-5p (RFC assessment is an administrative
9 finding of fact reserved to the Commissioner). No special
10 significance is given to a medical source opinion on issues reserved
11 to the Commissioner. 20 C.F.R. §§ 404.1527(e), 416.927(e). As
12 discussed above, the ALJ considered the record in its entirety and
13 factored Plaintiff's significant lack of credibility and symptoms
14 attributable to substance abuse into his evaluation. The record
15 supports the exertional and non-exertional limitations assessed and
16 the hypothetical question to the VE is supported by the record in
17 its entirety. Where the ALJ's determination is a rational
18 interpretation of the evidence, and substantial evidence supports
19 the determination of disability, the court may not substitute its
20 judgment for that of the Commissioner. *Parra v. Astrue*, 481 F.3d
21 742, 746 (9th Cir. 2007); *Tackett*, 180 F.3d at 1097. Accordingly,

22 **IT IS ORDERED:**

23 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
24 **DENIED;**

25 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
26 **GRANTED;**

27 The District Court Executive is directed to file this Order and
28 provide a copy to counsel for Plaintiff and Defendant. The file

1 shall be closed and judgment entered for Defendant.

2 DATED October 8, 2009.

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4 S/ CYNTHIA IMBROGNO
5 UNITED STATES MAGISTRATE JUDGE
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